RSA 84/2002
BEFORE
HON'BLE JUSTICE T.NK. SINGH

JUDGMENT AND ORDER

1. The challenge in this second appeal by the appellants/defendants is to the judgment and decree dated 2.3.02 passed by the learned Civil Judge (Senior Division), at Karimganj in Title Appeal No 17/2000 dismissing the appeal and affirming the judgment and decree dated 21.2.2000 passed by the learned Civil Judge (Junior Division No.2) Karimganj decreeing the Title Suit No. 15/81 in favour of the respondents/plaintiffs.

2. Heard Mr B.K.Goswami, learned Senior counsel assisted by Mr. P.Bhowmik appearing for the appellants/defendants as well as Mr P.K.Roy Choudhury, learned counsel appearing for the respondents/plaintiffs.

3. The basic pleaded case of the respondents/plaintiffs leading to the filing of the Title Suit No.15/81 in the Court of the learned Munsiff No.1 (Civil Judge, Junior Division No.2), Karimganj against the appellants/defendants are that the respondents/plaintiffs are the tenants in respect of 119 square cubits of land described in Schedule II out of the land described in Schedule I to the plaint . The Schedules I and II to the plaint read as follows:

SCHEDULE-I
Relating to Decemnial Mohal Taluk Ruprai (No. 9613/1660) and Taluk Ruprai (No. 9677/1726), Kitte Badarpur Bazar, Mouz Chapra, Pargana Chapaghat:

I). Homestead land measuring 190 square cubits measuring 20 cubits along east-west and 9 ‰ cubits along north-south. The land is bounded in the east by the land of Para II below: in the west by PWD Road; in the north by Arun Modak and in the south by the defendants' shop house.

II). Land measuring 325 square cubits, measuring 28 cubits along east-west, II cubits along north-south being the eastern boundary, an 14 cubits along the west. The boundaries of the said land are :

East: Cattle trek ; West: Land of Para I as above in the Northern part and defendants in the southern part: North: Arun Modak: South: Nagendra Das.

SCHEDULE II

Situated within the land of para II to schedule I above.

Land measuring 119 cubits measuring 28 cubits along east-west, 4 cubits along north-south in the east and 4 ‰ in the west. The land is bounded by Cattle-trek in the east; defdts' shop house in the west, remaining land of Para II to schedule I above in the north and Nagendra Das in the south .

4. The respondent/Plaintiff Late Dwarika Nath Sheel who instituted the Title Suit No. 15/81 was substituted by his LR on his death when the suit was pending . It is the further case of the respondents/plaintiffs that the plaintiff Dwarika Nath Sheel took the said land on monthly rent of Rs. 8/- (Eight) from the original owner Sri Gaur Charan Singha and the plaintiff Dwarikia was in possession of suit land by residing thereon. Late Gaur Charan Singha sold the suit property to Abdur Razzak and Md. Azir Uddin under a Registered Sale Deed dated 3.2.58, a certified copy of it had been exhibited as Ext.5 and since then the respondents/plaintiffs had been continuing as monthly tenants of the new landlords. In the year 1971 a severe fire broke out in Badarpur Bazar and the suit property was completely gutted in that fire. After the said fire the respondent/p

laintiff had constructed the shop, a latrine and a kitchen over the suit land. The Badarpur Town Committee instituted a suit being Title Suit No.292/72 in the court of the learned Munsiff No.2, Karimganj for declaration of the title in respect of the suit land against the said Abdur Razzak, Md. Azir Uddin, Ataur Rahman (who alleged to have purchased the suit land from the original owners Mohan Singh and Darshan Singh according to the appellants/defendants) and others. The learned Munsiff No.2 , Karimganj decreed the Title Suit No. 292/72 in favour of the Badarpur Town Committee by judgment and decree dated 18.8.75, a certified copy of which was exhibited as Ext. X. The plaintiffs/respondents continued to possess the suit land as jote holders in respect of the suit land under the Badarpur Town Committee by paying the rents, some of the rent receipts issued by the Badarpur Town Committee for receiving the rent from the respondents/plaintiffs were exhibited as the Ext.1, Ext. 2, Ext.3 and Ext.4 respectively.

5. The respondents/plaintiffs also pleaded that the appellants/respondents are also the tenants of the shop to the contiguous south of the respondents/plaintiffs' shop. One Sri Arun Modak who was/ is also the tenant of the shop to the contiguous north of the respondents/plaintiffs' shop and not in good term with the respondents/plaintiffs induced the appellants / defendants to dispose the respondents/plaintiffs from the land mentioned in Schedule II of the plaint. Hence, the respondents/plaintiffs filed the Title Suit No. 15/81 for the following reliefs :

(ka) That the pltfs' tenancy a occupancy right in respect of 119 square cubits of land described in schedule II below out of the land of para II to schedule I be declared and they be given khas possession thereof upon demolition and removal of all constructions made thereon by the defdts and their henchmen and they be awarded Rs. 100.00, the sum being the cost of demolishing the said constructions:

(kha). That a permanent injunction be issued against the defdts, thereby preventing them from causing any hindrance to the pltfs' title to and possession ever the suit land.

(Ga). That the pltfs be awarded any other or further relief or reliefs as the Hon'be Court may deem fit and proper.

(Gha). That the pltfs be awarded the cost of the suit .

6. The appellants/defendants also filed the written statement and in the written statement they have pleaded that the suit land was originally belonged to the land lords, namely, Mohan Singh and Darshan Singh who sold the suit land to one Ataur Rahman and the appellants/defendants were the tenants of the suit land under him. Badarpur Town Committee became the proprietor of the suit land and the suit house vide judgment and decree dated 18.8.75 passed in Title Suit No. 292/72 against Ataur Rahman, Abdur Razzak and Md. Azir Uddin and others. It is also the further case of the appellants/defendants that Badarpur Town Committee(the defendant No.12 in the Title Suit No. 15/81/respondent No.9 in the present appeal) had allowed the appellants/defendants to possess the suit land by virtue of the lease deed executed in the year 1983 while the Title Suit No.15/81 was pending before the learned trial court.

7. Upon pleading of the parties six issues were framed which are as follows :

1. Is there any cause of action of this suit ?
2. Is the suit maintainable in its present form ?
3. Is the suit is bad for defect of parties ?
4. Is the suit is bad for waiver, estoppel and acquiescence ?

5.To what relief the plaintiff is entitled to ?
6. Whether the plaintiff has got right, title and interest over the suit land ?

8. The respondents/plaintiffs had adduced 2 P.Ws in support of their case and also produced documentary evidence i.e. Ext. 1, Ext. 2, Ext.3 , Ext. 4 and the Ext.X. The appellants/defendants also adduced 3 D.Ws and also produced the documentary evidence in support of their case.

9. Both the learned trial court and the first appellate court after careful appreciation of the statements of PWs and DWs and also the documentary evidences had come to concurrent finding that the respondents/plaintiffs are the tenants of the suit land and the appellants/defendants had trespassed on the suit land. After such finding the learned trial court decreed the Title Suit No. 15/81 vide judgment and decree dated 21.2.2000 which had been affirmed by the learned first appellate court vide judgment and decree dated 2.3.02 passed in Title Appeal No. 17/2000 The present second appeal filed by the appellants/defendants was admitted for hearing on the following substantial questions of law:

1. Whether the decisions of the courts below that the renewal of the lease of the suit land by the Town Committee in 1994 was hit by Section 52 of the T.P.Act ?

2. Whether the claim of the plaintiff could be granted on the basis of Ext.5, which on the finding Judge himself was not duly proved ?

10. Mr. B.K.Goswami, learned Senior counsel in support of the case of the appellants/respondents had relied on the decisions of the Apex Court :
1. (2000) 1 SCC 434
Ishwar Dass Jain Vs Sohan Lal

2.(1997) 3 SCC 546
Major Singh Vs Rattan Singh

3.(1992)1 SCC 647
Jagadish Singh Vs Natthu Singh

4.(2005) 3 SCC 702
State of Punjab Vs Mohinder Singh.

11. In order to appreciate the aforesaid submission of the learned Senior counsel appearing for the appellants/defendants and also for deciding the substantial question of laws formulated in this appeal, this court had given conscious application of mind to the statement of the PWs , DWs and the Exhibited documentary evidence produced by the parties and also to see any interference to the said concurrent finding of facts by the learned trial court and the learned appellate court is called for. The Apex court in Iswar Dass Jain(supra) held that- there are two situations in which interference with findings of fact is permissible in the second appeal, the first one is when material or relevant evidence is not considered which, if considered would have led to an opposite conclusion. The Apex court further held that the first appellate court is under a duty to examine the entire relevant evidence on record and if it refuses to consider important evidence having direct bearing on the disputed issue and the error which arises is of a magnitude that it gives birth to a substantial question of law, the High Court is fully authorized to set aside the finding. Therefore, this Court in the second appeal under Section 100 of the CPC is required to see whether material or relevant evidence is not considered not only by the learned trial court but also by the learned first appellate court in coming to the concurrent f

indings stated above.

12. The Apex Court in Jagadish Singh (supra) had considered the scop e of jurisdiction of the High Court to reappreciate the evidence in the Second A ppeal . In Para 10 of SCC in Jagadish Singh(supra) , the Apex Court held that :

Para-10. In our opinion, the High Court was right in its view. The notices must be presumed to have been served as contemplated by Section 27 of the General Cl auses Act. As to the jurisdiction of the High Court to reappreciate evidence in a second appeal it is to be observed that where the findings by the court of fa cts is vitiated by non-consideration of relevant evidence or by an essentially e rroneous approach to the matter, the High Court is not precluded from recording proper finding. We find no substance in the first contention .

13. The Apex court again in State of Punjab (supra) held that - the first appellate court acting on irrelevant materials and leaving out of conside ration of relevant materials, reversed the finding of the learned trial court a nd in that case the High Court was not justified in dismissing the second appeal on the ground that no substantial question of law was involved. This court is required to see whether or not there were improper functioning of the learned f irst appellate court in not reversing the judgment and decree of the learned t rial court dated 21.2.2000 passed in Title Suit No. 15/81 by passing the impugne d judgment and decree dated 2.3.02.

14. The Apex Court in Santosh Hazari Vs Purushottam Tiwari , reporte d in (2001) 3 SCC 179 held that the judgment of the Ist appellate court must dis play conscious application of mind and the record findings supported by reasons on all issues. The Ist appellate court being a final court of facts, the pure fi ndings of fact by the Ist appellate court shall remain immune from challenging b efore the High Court in Second Appeal, the Apex Court in Santosh Hazari (supra) observed that -

The appellate court has jurisdiction to reverse or affirm the findings of the t rial court First appeal is a valuable right of the parties and unless restricte d by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court must, therefore, reflect its consc ious application of mind and record findings supported by reasons, on all the is sues arising along with the contentions put forth, and pressed by the parties fo r decision of the appellate court. The task of an appellate court affirming the findings of the trial court is an easier one. The appellate court agreeing with the view of the trial court need not restate the effect of the evidence or reit erate the reasons given by the trial court, expression of general agreement wit h reasons given by the court, decision of which is under appeal, would ordinaril y suffice (see Girijanandini Devi Vs Bijendra Narain Choudhury). We would, howev er, like to sound a note of caution. Expression of general agreement with the fi ndings recorded in the judgment under appeal should not be a device or camouflag e adopted by the appellate court for shirking the duty cast on it. While writing a judgment of reversal the appellate court must remain conscious of two princip les. Firstly, the findings of fact based on conflicting evidence arrived at by t he trial court musty weigh with the appellate court, more so when the findings a re based on oral evidence recorded by the same Presiding Judge who authors the j udgment. This certainly does not mean that when an appeal lies, on facts, the ap pellate court is not competent to reverse a finding of fact arrived at by the tr ial Judge. As a matter of law if the appraisal of the evidence by the trial cou rt suffers from a material irregularity or is based on inadmissible evidence or on conjectures and surmises, the appellate court is entitled to interfere with the finding of fact. (See Madhusudan Das V. Narayanibai. The rule is-and it is n othing more than a rule of practice- that when there is conflict of oral evidenc e of the parties on any matter in issue and the decision hinges upon the credibi

lity of witnesses , then unless there is some special feature about the evidence of a particular witness which has escaped the trial Judge's notice or there is a sufficient balance of improbability to displace his opinion as to where the credibility lie, the appellate court should not interfere with the finding of the trial Judge on a question of fact. (See Sarju Pershad Ramdeo Sahu v. Jwaleshwari Pratap Narain Singh). Secondly, while reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it. We need only remind the first appellate courts of the additional obligation cast on them by the scheme of the present Section 100 substituted in the Code. The first appellate court continues, as before , to be a final court of facts; pure findings of fact remain immune from challenge before the High Court in second appeal. Now the first appellate court is also a final court of law in the sense that its decision on a question of law even if erroneous may not be vulnerable before the High Court in second appeal because the jurisdiction of the High Court has now ceased to be available to correct the errors of law or the erroneous findings of the first appellate court even on questions of law unless such question of law be a substantial one .

15. The Apex Court in Mehrunnisa and others vs Visham Kumari and another , reported in (1998) 2 SCC 295 held that interference with the findings of the Ist appellate court in the second appeal by the High Court would be called for when the Ist appellate court reversed the judgment of the trial court without reading the entire evidence without taking into account of the document necessary for giving findings on the issue.

16. Per contra Mr. P.K.Roy Choudhury, learned counsel appearing for the respondents/appellants submits that the appellants/defendants had failed to make out any substantial question of law which called for interference by this court in the second appeal under Section 100 CPC to the concurrent findings of fact by the trial court and the first appellate court. In support of his contention, Mr. P.K.Roy Choudhury makes the heavy reliance on the decisions of the Apex Court in M. Nadarkesavan Nadar Vs Narayanannadar Kunjan Nadar, reported in (2000) 10 SCC 244 . The fact in M. Nadarkesavan (supra) was that the respondent alleged that they had perfected their title over the suit land by adverse possession. The Apex Court in that case held that on the failure of the respondent to discharge the burden of proof which was on them, the High Court should not interfere with the concurrent finding of fact that it was wrong when the same was not perverse nor was based on no evidence. Para 6 of the SCC in M.Nadarkesavan Nadar(supra) reads as follows :

Para-6. It appears to us that in second appeal the High Court was in error in examining the evidence and then reversing the finding of the trial court in the lower appellate court by holding that the possession of the respondents satisfied the requirements of adverse possession. Both the trial court and the lower appellate court had, in no uncertain terms, come to the conclusion that the respondents had failed to establish by positive evidence that, their possession of the disputed property was hostile to the real owner and in denial of his title. Even if the finding of fact was wrong, in our opinion this finding of fact could not be disturbed specially when the High Court has not come to the conclusion that the same was not perverse nor was based on no evidence. The trial court as well as the lower appellate court have discussed the evidence on the record and then had come to the conclusion that the defence in Suit No.645 of 1970, namely, the respondents herein, had failed in showing that they had perfected their title by adverse possession. It is to be noted that the issue in this regard placed the burden of proof on the respondents and as they had not led evidence to show that they had perfected that title, their plea had to fail .

17. Keeping in view of the ratio laid down by the Apex Court in the

cases cited by the learned Senior counsel appearing for the appellants/defendants and also the learned counsel appearing for the respondents/plaintiffs, this Court not only heard the submissions of the learned counsels of both the parties but also meticulously examined the oral and documentary evidence of both the parties. It appears that the main thrust of the learned Senior counsel while arguing the substantial question of law No.2 formulated in the present second appeal is that the learned first appellate court had considered the certified copy of the sale deed dated 3.2.58, Ext.5 while passing the impugned judgment and decree dated 2.3.02 by the learned first appellate court.

18. From perusal as well as conscious judicial application of mind of this court to the impugned judgment and decree passed by the learned first appellate court, it is crystal clear that the first appellate court had not taken the certified copy of the sale deed dated 3.2.1958(Ext.5) as the document for proving the transfer of right in respect of the suit land to the said Abdur Razzak , Md. Azir Uddin by the Gaur Charan Singha as the certified copy of the Registered Sale Deed dated 3.2.58 was not properly proved. This Court is of the firm view that the certified copy of the Registered Sale Deed dated 3.2.58 (Ext.5) cannot be said to have been proved for proving the transfer of right in respect of the suit land in favour of said Abdur Razzak and Md. Azir Uddin. But it is equally settled law that the certified copy of the sale deed dated 3.2.58 (Ext.5) could be used for collateral purpose and not for purpose for which the said sale deed dated 3.2.58 was executed. In other words, the appellate court is legally permissible to see the recital of the certified copy of the sale deed dated 3.2.58 (Ext.5) for collateral purpose. The learned first appellate court had simply looked into the recital of the certified copy of the sale deed (Ext.5) while deciding the fact as to whether or not the respondent/plaintiff Late Dwarika Nath Sheel and the appellant/defendant Late Tarini Mohan Paul were the tenants of the suit land. Therefore, this court is of the considered view that there is no illegality committed by the learned first appellate court in looking into the recital of the document (Ext.5).

19. For deciding the substantial question of law No.1, this court also had carefully appreciated the respective pleadings of both the appellants/defendants and the respondents/plaintiffs as well as the statements of the PWs and Dws and exhibited documents. It is also an admitted fact of both the parties that Badarpur Town Committee had executed a lease deed dated 27.12.83 in respect of the suit land in favour of the defendants during the pendency of the Title Suit No.15/81 without obtaining leave of the Court. It is the case of the respondents/plaintiffs that such transfer of interest in respect of the suit land by the Badarpur Town Committee (respondent No.9 in the present appeal) in favour of the appellants-defendants while the Title Suit No.15/81 was pending is hit by Section 52 of the T.P. Act , which read as follows:

Section 52. Transfer of property pending suit relating thereto.- During the (pendency) in any court having authority (within the limits of India excluding the State of Jammu and Kashmir) or established beyond such limits by the Central Government *** of (any) suit or proceedings which is not collusive and in which any right to immoveable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceedings so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose.

Explanation: For the purpose of this section, the pendency of a suit or proceeding shall be deemed to commence from the date of the presentation of the plaint or the institution of the proceeding in a court of competent jurisdiction, and to continue until the suit or proceeding has been disposed of by a final decree or order and complete satisfaction or discharge of such decree or order has been obtained, or has become unobtainable by reason of the expiration of any period of

limitation prescribed for the execution thereof by any law for the time being in force .

20. Mr. P.K.Roy Choudhury , in order to bolster up the case of the respondents/plaintiffs while considering the substantial question of law No.1 had referred to the decision of the Apex Court in Amit Kumar Shaw and another Vs Farida Khatoon and Another, reported in (2005) 11 SCC 403 and Bibi Zubaida Khatoon Vs Nabi Hassan Saheb and Another, reported in (2004) 1 SCC 191. Para 9, 10, 11 of the SCC in Bibi Zubaida Khatoon (supra) reads as follows:

Para-9. It is not disputed that the present petitioner purchased the property during pendency of the suit and without seeking leave of the court as required by Section 52 of the Transfer of Property Act. The petitioner being a transferee pendente lite without leave of the court cannot, as of right, seek impleadment as a party in the suits which are long pending since 1983. It is true that when the application for joinder based on transfer pendente lite is made, the transferee should ordinarily be joined as a party to enable him to protect his interest. But in the instant case, the trial court has assigned cogent reasons for rejecting such joinder stating that the suit is long pending since 1983 and prima facie the action of the alienation does not appear to be bona fide. The trial court saw an attempt on the part of the petitioner to complicate and delay the pending suits .

Para-10. The decisions cited and relied on behalf of the appellant turned on the facts of each of those cases. They are distinguishable. There is no absolute rule that the transferee pendente lite without leave of the court should in all cases be allowed to join and contest the pending suits. The decision relied on behalf of the contesting respondents of this court in the case of Sarvinder Singh fully supports them in their contentions. After quoting Section 52 of the Transfer of Property Act, the relevant observations are thus: (SCC pp. 541-42, para 6) .

6. Section 52 of the Transfer of Property Act envisages that:

During the pendency in any court having authority within the limits of India &. Of any suit or proceeding which is not collusive and in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under the decree or order which may be made therein, except under the authority of the court and on such terms as it may impose .

It would, therefore, be clear that the defendants in the suit were prohibited by operation of Section 52 to deal with the property and could not transfer or otherwise deal with it in any way affecting the rights of the appellant except with the order or authority of the court. Admittedly, the authority or order of the court had not been obtained for alienation of those properties. Therefore, the alienation obviously would be hit by the doctrine of lis pendens by operation of Section 52. Under these circumstances, the respondents cannot be considered to be either necessary or proper parties to the suit .

Para 11. In the case of Dhurandhar Prasad Singh observations relevant for the purpose of these appeal read thus: (SCC pp. 541-42, para 7)

Where a party does not ask for leave, he takes the obvious risk that the suit may not be properly conducted by the plaintiff on record, yet he will be bound by the result of the litigation even though he is not represented at the hearing unless it is shown that the litigation was not properly conducted by the original party or he colluded with the adversary .

21. From the ratio laid down by the Apex court in Amit Kumar Shaw and another Vs Farida Khatoon and Another(supra) and Bibi Zubaida Khatoon Vs Nabi Hassan Saheb and another (supra), it is clear that the lease deeds, one in 1983 and another in 1994 executed by Badarpur Town Committee (defendant No.12 in Title Suit No.15/81 and the respondent No.9 in the present appeal)in favour of the appellants/respondents) during the pendency of the Title Suit No. 15/81 is hit by Section 52 of the T.P. Act.

22. For the reasons discussed above, two substantial questions of law formulated in the present appeal are decided against the appellants/defendants. Accordingly, the second appeal is devoid of merit and dismissed.

23. The parties shall bear their own costs.